No. 98-1706

IN THE

Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioners Intertanko and the United States of America each seek issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. As a result of that court's decision in *International Association of Independent Tanker Owners v. Locke*, 148 F.3d 1053, *reh'g and reh'g en banc denied*, 159 F.3d 1220 (9th Cir. 1998), meticulously developed federal and international safety and environmental protection requirements that have evolved over many years now have meaning in five key coastal states only until a state or local government acts on its own inspiration to do something different. This Court in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978) has admonished that "the Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." 435 U.S. 165. In the Ninth Circuit, contrary state judgements can now prevail.

Intertanko argues that the permissible realm of state action in subject matters affecting interstate and foreign commerce vessel safety standards is where federal action is discretionary and has not been asserted[1] or where the state addresses secondary, off-vessel non-maritime conduct or subject matters.[2] *Ray* acknowledged acceptable examples of such peripheral state

1. *See Ray*, 435 U.S. at 171-72 (finding no preemption where Secretary had not promulgated regulations regarding tug-escorts).

2. *See, e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 450-53 (1994) (state *forum non conveniens* rule not preempted); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (no preemption of enforcement of local smoke abatement laws for vessels moored within city limits); *Barber v. Hawaii*, 42 F.3d 1185, 1193 (9th Cir. 1994) (federal authority over anchorage and mooring discretionary not automatically preemptive); *Beveridge v. Lewis*, 939 F.2d 859, 865 (9th Cir. 1991) (no federal preemption of local mooring and anchorage restrictions); *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1427 (9th Cir. 1990) (no preemption of state requirements governing overtime pay); and *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom., Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985) (State ballast discharge regulations not preempted under Federal Water Pollution Control Act).

regulations, but cautioned that none of these cases involved a direct coincidence with the objects of federal regulation. *See Ray*, 435 US at 164. Here, the overlap of federal and state objects and content is total. The State does not deny that state law describes an authority to bar from State of Washington waters tank vessels that meet all federal, foreign and international operational, personnel qualification and manning requirements.[3]

1. Intertanko has no quibble with the State's exposition of basic preemption principles. State Resp. at 10-11. These principles support issuance of the requested writ. A time-honored, pervasive and comprehensive federal regime governing marine environmental protection and vessel safety describes federal interests "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The State and Intervenors place substantial weight on the axiom that "historic" or "traditional" exercises of state police powers are not to be set aside absent clear Congressional intent to do so. State Resp. at 10; Intervenors' Resp. at 4-5. Absent, however, is authority stating that regulation of tank vessel operations and navigation, crew training and qualifications, or manning requirements have ever been deemed to be components of traditional state police powers. The responding briefs do not cite any instance, prior to this matter, in which state or local vessel regulations have been permitted to displace federal vessel and environmental regulations addressed to the same subjects.

2. The essence of both responses is an invitation to this Court to follow the Court of Appeals in two fundamentally erroneous elements of the decision below.[4] The State's position

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3. The State in its response disavows "the authority or ability to deny entry into state waters." State Response at n.4. This disavowal by counsel of an authority expressly granted by the State statute is of no comfort either operationally or constitutionally.

4. The State's response leads with a description of the undisputed (Cont'd)

opposing issuance of a writ of certiorari first asks the Court to join the Ninth Circuit's disregard for the plain language, context, ancestry and legislative history of a standard savings provision in the "Liability and Compensation" title of the Oil Pollution Act of 1990 ("OPA 90") (Section 1018 of Pub. L. No. 101-380, 33 U.S.C. § 2718). State Response at 8-9, 18-21. The Court of Appeals expansively interpreted this preservation of pre-existing federal, state and local authorities over liability, fines, and penalties and extrapolated from it a general expression of Congressional resolve to terminate federal dominance in tank vessel safety areas. *Intertanko*, 148 F.3d at 1060; Pet. App. A at 17a-18a. The State asks this Court to follow suit and to accept, as a basis for denying the requested writ, the notion that Congress intended "that *no* areas of state authority over the discharge of oil were preempted." State Resp. at 19 (emphasis in original).

Section 1018 means no more than it says. It preserves to both the state and federal government those powers related to liability, compensation, removal, penalties and response to oil discharges that pre-dated OPA 90. Judge Graber's dissent on this point is extensively researched and worthy of review in the context of determining that a writ of certiorari should issue. *See Intertanko*, 159 F.3d at 1222-25; Pet. App. C at 80a-88a. Section 1018 *preserves* a narrow, pre-existing authority at all levels of government to impose liabilities and requirements

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beauty, natural abundance and ecological complexity of Puget Sound and other state waters. State Response at 1-2. The attributes of various coastal regions of the United States should not be permitted to obscure a constitutional conflict of utmost gravity. The issue presented is whether federal treaty undertakings, Congressional enactments, and Coast Guard regulatory measures intended to promote vessel safety and environmental protection for the nation and its constituent maritime regions can, consistent with the federal structure framed by the Constitution, be superseded by disparate state measures. This constitutional analysis, correctly applied, cannot in any way harm the marine environment that all parties seek to protect.

regarding the "discharge" and "removal" of pollutants. These terms are defined in Title I of OPA and in implementing regulations.[5] Section 1018 does not use the word "prevention." It contemplates a scenario where oil has been discharged and (in the case of subsection (c)) where federal, state or local actions are necessary to respond to a substantial threat of discharge.

Congress denominated Title I of OPA 90 "Liability and Compensation." Subsection (a) of section 1018 commences with "Nothing in this chapter or the Act of March 3, 1851 . . ."[6] None of the federal statutes regulating vessel design, construction, operations, safety, manning or training, such as the PWSA, the amendatory Port and Tanker Safety Act, or the host of other federal maritime statutes, regulations and international treaties, is referenced. Where there is no "discharge of oil or other pollution by oil within such state," or "removal activities in connection with such a discharge," a state draws no authority from subsection (a).

Subsection (c) similarly discourages an expansive interpretation of section 1018. The laws specified in subsection (c) are OPA, the 1851 Act and, in addition, the Internal Revenue Code. By language and context, this is a savings clause addressing liability, fines and penalties relating to a discharge of oil or a substantial threat of discharge of oil. This subsection expressly preserves state, local and federal authority. *See* 33 U.S.C. § 2718(c) and Pet. App. E at 182a. Congress would not have provided for non-preemption of the federal government. Instead, it preserved existing fine and penalty authorities at all levels of government.

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5. "Discharge" 33 U.S.C. § 2701(7); "Liability" 33 U.S.C. § 2701(17); "Removal" 33 U.S.C. § 2701(30); "substantial threat of discharge" 33 C.F.R. § 155.1020.

6. The 1851 Act is a limitation of liability statute that permits a party to enjoin all pending suits and compel them to be consolidated in a limitation proceeding. *See* 46 U.S.C. § 181 and Rule F of the Supplemental Rules for Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.

Section 1018's language is not unique to OPA. The State and Intervenors do not respond to INTERTANKO's observation that the language of section 1018 pre-dates OPA 90 by nearly thirty years and has never been found to authorize state regulation of vessel operations and personnel requirements. Pet. at 24-25. In 1990, Congress conformed predecessor Federal Water Pollution Control Act ("FWPCA") language to the language of OPA section 1018. Pet. App. F at 261a. The Conference Report to OPA explains that the purpose of this amendment is to "*preserve* explicitly the authority of any state to impose its own requirements or standards with respect to *liability* of persons involved in the *removal* of oil." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess (1990), *reprinted in* 1990 U.S.C.C.A.N. 799-800 (emphasis added). The State's challenged vessel regulations governing tanker equipment, operations, personnel qualifications and manning have nothing whatsoever to do with liability and compensation issues. A proper reading and application of OPA section 1018 defeats all other substantive arguments raised by the State and its allies.

Title I of OPA applies to oil pollution no matter the source, specifically vessels and facilities. "Facilities" include motor vehicles, rolling stock, and pipelines. 33 U.S.C. § 2701(9). If Congress had intended to devolve to local level regulatory authority over federal energy and transport programs, there would have been some express manifestation of this intent. There is none. Congress intended to preserve state and federal authority to impose liability, compensation and removal requirements if a spill from a land or marine source polluted State waters.[7]

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7. The State's extensive quotation of Congressional Committee Reports at pages 20-22 of its Response is extravagantly misleading in the absence of any advice to the Court on the context of the issue there under consideration. As Intertanko informed the Ninth Circuit Court, *see* Brief for Appellant Intertanko at 48-53 (June 30, 1997), and as Judge Graber's dissent recognizes, *see supra* at p. 5, the legislation reported in the cited passages arose from a stand-alone liability and compensation measure that was later joined with other bills to become the Oil Pollution Act of 1990.

3. Because the Congress expressly stated that section 1018 of Title I of OPA 90 does not "disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, . . ." (H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. pp. 121-122 (1990)), the State must supplement its expansive interpretation of section 1018 of OPA 90 with a correspondingly miniaturist approach to the preemptive rationale of *Ray*. State Resp. at 12-17. The Court in *Ray* found all mandatory provisions of Title II of the Port and Waterways Safety Act at issue to have compelling preemptive effect against every State regulation that corresponded to the subject matters of the federal statute. There is no reason that a differing result should obtain here.

It is unavailing for the State and Intervenors to protest that *Ray* is not a severely hostile precedential environment for the State's efforts to avoid a preemption conclusion. The State recognizes the strongly preemptive coloring of Title II PWSA and tries to detach "operational rules" from Title II to place them in what the State argues is a more forgiving preemptive setting of Title I PWSA.

The State suggests that because state pilotage rules for registered vessels were permitted by the *Ray* decision, federal "operational" requirements must be of lesser preemptive impact than the design, construction and equipment elements of Title II, PWSA. State Response at 14. This is a significant misstatement of the *Ray* decision. State pilotage requirements for registered vessels were upheld in *Ray* because federal law expressly authorizes state pilotage requirements for registered vessels.[8] The *Ray* Court did not, as the State strongly implies, protect State pilotage requirements for registered vessels because it found "operations" subject matters to be less preemptive in their effect than the "design", "construction" or "equipment" elements. State Resp. at 16.

8. *See* 435 U.S. at 158-160. INTERTANKO noted in its Petition that there are express federal permissions to the states that govern pilotage (46 U.S.C. § 8501), and recreational vessel safety and titling (46 U.S.C. chs. 122, 125 and 131). Pet. at 7 and 24. These subjects are not at issue here.

More audacious is the State's explanation of *Ray*'s treatment of tug escort requirements. In *Ray*, the Court upheld the tug escort requirements only because they fell within the discretionary Title I of PWSA *and* because they operated in a vacuum of federal action. The State cannot here argue that there is a void in federal coverage of the contested subject matter.[9]

4. Whatever the force of the preemptive content of PWSA in 1978, its coverage has expanded, not contracted, since that time. The statute was considerably enlarged in 1978 by amendments in the form of the Port and Tanker Safety Act ("PTSA"). Pub. L. No. 95-474, 92 Stat. 1471 (1978). Federal powers were increased to address gaps in PWSA. Intervening Coast Guard regulations and OPA 90 itself significantly enlarged the federal domain of vessel safety and marine environmental protection measures. Federal authority was expanded in OPA 90 over discharge response functions that traditionally had had strong local authority content. *See* 33 U.S.C. §§ 1321(c)(1)(B)(ii), (c)(2) and (c)(3). Moreover, since the date of OPA 90's enactment, the United States has continued to accede to international conventions governing vessel operational procedures.[10] The Coast Guard Authorization Act of 1996

9. Even if the State were to succeed in convincing the Court that challenged State "operational" regulations were Title I PWSA subject matters, Title I itself has been deemed by the Court to be decidedly preemptive in its content and structure. The Court in *Ray* remarked that section 1222(b) of the Port and Waterways Safety Act, by granting the states express authority to regulate standards "for structures only," was intended to reject any state role in establishing standards for vessels. *Ray*, 435 U.S. at 174. The Court quoted the House Report that accompanied the PWSA stating that the express language concerning state authority over structures (*e.g.*, bridges and piers) provides "a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated." 435 U.S. at 174.

10. *See* Presidential Proclamation amending Convention on International Regulation for Preventing Collisions at Sea, 57 Fed. Reg. 29,129 (1991); International Convention on Standards of Training, (Cont'd)

(Pub. L. No. 104-324, Oct. 19, 1996) addressed implementation of the International Safety Management Code, drug and alcohol testing, tank vessel oil spill prevention, and marine environmental protection. The Coast Guard Authorization Act of 1998 (Pub. L. No. 105-383, Nov. 13, 1998) extends the Coast Guard's regulatory authority over vessel operations, alcohol testing, the International Safety Management Code, petroleum transportation, and marine casualty reports.

This recitation is intended to convey to the Court that the process of enlargement of traditional, dominant federal presence in these areas has continued to be pressed by the Congress and the Executive Branch since *Ray* and since enactment of OPA 90. This circumstance is not consistent with the dramatic post-OPA 90 "devolutionary" scenario advanced by the State and accepted largely uncritically by the Court of Appeals. State Resp. at 12-17; *Intertanko*, 148 F.3d at 1060-62 and Pet. App. at 18a-22a. Post-OPA 90 federal activity also undermines the perception of the Court of Appeals that OPA 90 had non-preemptive ripple effects that act to eviscerate the previously preemptive structure of PWSA and related federal measures. *Intertanko*, 148 F.3d at 1060-62; Pet. App. A at 19a-22a.

5. The expansion in scope and technical complexity of international treaties governing tank vessel operations amplifies the adverse impacts of unilateral state action on the foreign affairs prerogatives of the national government. The PWSA and Title 46 of the United States Code are replete with unambiguous Congressional expressions of support for and recognition of the incorporation of international standards into federal law

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Certification, and Watchkeeping for Seafarers ("STCW") (Senate Advice and Consent, 137 Cong. Rec. S5730 (daily ed. Apr. 25, 1991)); Safety of Life At Sea (SOLAS) amendments implementing the International Safety Management Code; ship reporting systems under SOLAS; and 1995 amendments to the STCW (46 U.S.C. ch. 32, Oct. 19, 1996).

governing both United States and foreign vessels. Both the State and Respondent-Intervenors find fault with the international safety system (State Resp. at 25-28; Respondent-Intervenors at 12 and 25-28), but neither has offered a sensible rationale as to when a federal decision to accede (or not to accede) to international agreements governing this most international and mobile of industries should be vulnerable to unilateral second-guessing by states and localities.[11]

6. The State appears to argue that federal statutes, particularly the Oil Pollution Act of 1990, that have among their policy goals the prevention of marine oil spills cannot have preemptive effect if challenged state regulations are motivated by similar objectives. State Response at 6-8, 17-22. *See also* Response of Intervenors at 11-12. This type of argument is not uncommon in preemption cases, but its flaws are well understood. In *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992), this Court reviewed Illinois occupational safety and health measures that trespassed into federal OSHA programs. The Court explained the essential futility of relying on avowed non-obstructive purposes of state statutes:

> Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective — that would be tangentially furthered by the proposed state law.

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11. The distinction between "self-executing" and "non-self-executing" agreements advanced by Respondent-Intervenors has meaning only where defining the rights of individuals to bring actions based on treaty commitments. *See Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (stating that treaties do not provide basis for private lawsuits "unless they are intended to be self-executing.").

505 U.S. at 105-106. Here, the challenged State vessel regulations operate on the same object as the federal regime. They both attempt to regulate marine safety aboard tank vessels subject to federal requirements. As cautioned in *Gade*, "[t]o allow a state selectively to 'supplement' certain federal regulations with ostensibly nonconflicting standards would be inconsistent with this federal scheme of establishing uniform federal standards, on the one hand, and encouraging States to assume full responsibility for development and enforcement of their own OSH programs, on the other." 505 U.S. at 103.

That there is a coincidence of purpose does not prevent a constitutionally intolerable conflict between state and federal regulations, particularly where, as here, the federal statutes (PWSA, PTSA, OPA 90) all reflect a strong Congressional mandate for a controlling federal presence in the field of marine safety and environmental protection. The express exception of liability, compensation, penalties, and response measures embodied in section 1018 of OPA 90 and its predecessors cannot be permitted to swallow enumerated federal powers over interstate and foreign maritime commerce and international commitments, present and future, of the United States of America.

CONCLUSION

For these reasons as well as those stated in the petitions of both Intertanko and the United States of America, a writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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